STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND THOMPSON and JEAN THOMPSON, Individually and as Next Friend to LATAVIS A. THOMPSON, Plaintiffs-Appellants,	UNPUBLISHED July 10, 2008
v	No. 276291 Saginaw Circuit Court
FARM BUREAU INSURANCE COMPANY, Defendant-Appellee.	LC No. 06-059567-CK

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff Raymond Thompson and his grandson Latavis were involved in an automobile accident in which another vehicle struck their vehicle. The driver of the other vehicle was uninsured. Plaintiffs filed a separate action against the uninsured driver in which they alleged that Raymond's and Latavis's injuries included a serious impairment of body function under MCL 500.3135(1). Plaintiffs obtained a default against the driver in the other case.

Plaintiffs filed this action against defendant, their no-fault insurer, and asserted a claim for uninsured motorist benefits under their policy. Plaintiff Jean Thompson brought a claim for loss of consortium.

Defendant's no-fault policy contains the following provision regarding the scope of coverage for uninsured motorist benefits:

> A. Insuring Agreement
>
> 1. If you pay a premium for Uninsured Motorist Coverage, we agree to pay compensatory damages which an **insured** is legally entitled to recover from the owner or operator of an **uninsured automobile**. The damages must result from **bodily injury** sustained by an **insured** caused by an **accident**. The owner's or operator's liability for these damages must arise from the ownership, operation,

maintenance, or use of the **uninsured automobile** as an automobile. We have no duty to pay punitive or exemplary damages.

2. If an injured person is legally entitled to recover damages, the amount of those damages may be determined by agreement between the injured party and us. We will not be bound by any judgments for damages or settlements made without our written consent.

Defendant filed a motion for summary disposition under MCR 2.116(C)(10), alleging that they were not bound by the default judgment plaintiffs obtained in their other case against the uninsured driver, because they did not consent to the judgment, and further, that plaintiffs' injuries could not meet the no-fault threshold in MCL 500.3135, thus precluding recovery for uninsured motorist benefits. The trial court agreed that plaintiffs were unable to satisfy the no-fault threshold in MCL 500.3135(1) and, therefore, were not entitled to uninsured motorist benefits under the policy. Accordingly, it granted defendant's motion.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). "The interpretation of clear contractual language is an issue of law that we also review de novo on appeal." *McGraw v Farm Bureau Gen Ins Co of Michigan*, 274 Mich App 298, 302; 731 NW2d 805 (2007).

On appeal, plaintiffs do not challenge the trial court's determination that they are not able to satisfy the no-fault threshold requirement in MCL 500.3135 of death, serious impairment of body function, or permanent serious disfigurement. However, they argue that the phrase "legally entitled to recover" in the uninsured motorist coverage section of defendant's policy is ambiguous and that the trial court erred in interpreting this phrase as requiring that they meet the no-fault threshold in order to be entitled to uninsured motorist benefits. We disagree.

As this Court explained in *Scott v Farmers Ins Exch*, 266 Mich App 557, 561; 702 NW2d 681 (2005):

> Uninsured motorist coverage is optional and is not mandated by the no-fault act. *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525; 502 NW2d 310 (1993). Accordingly, the policy language governs the coverage and is subject to the rules of contract interpretation. *Id*. at 525. We read insurance contracts as a whole and accord their terms their plain and ordinary meaning. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). We will not strain to find ambiguity, *id.* at 567, but we ultimately strive to enforce the agreement intended by the parties. *Engle v Zurich-American Ins Group (On Remand)*, 230 Mich App 105, 107; 583 NW2d 484 (1998). A contract is ambiguous when its words may be reasonably understood in different ways. *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d

> 440 (1982) (opinion of COLEMAN, C.J.). If an ambiguous term exists in the contract, courts should generally construe the term against the contract's drafter, unless the drafter presents persuasive extrinsic evidence that the parties intended a contrary result. *Id*.; *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470-471; 663 NW2d 447 (2003).

In this case, defendant's insurance policy provides, in pertinent part, that it will "pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an uninsured automobile." In *Auto Club Ins Ass'n v Hill*, 431 Mich 449; 430 NW2d 636 (1988), our Supreme Court considered a similar policy that limited an insurer's obligation to pay uninsured motorist benefits to damages for bodily injury that an insured person "is legally entitled to recover" from the owner or operator of an uninsured vehicle. The Court held:

> We hold that, pursuant to MCL 500.3135(1) . . . , uninsured motorists are subject to tort liability for noneconomic loss only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. Our review of the terms of the insurance agreement upon which the defendant's claim was based compels us to hold that he is not entitled to compensation for his noneconomic loss unless his loss meets the threshold requirement. [*Id.* at 466.]

Plaintiffs argue that the rationale in *Hill* has been superceded by our Supreme Court's later decisions in *Rohlman*, *supra*, and *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 533; 676 NW2d 616 (2004), and that *Hill* is no longer valid and should not be followed. We disagree.

In *Rohlman*, the Court addressed claims for both personal injury protection (PIP) benefits under the no-fault act and uninsured motorist benefits. The Court stated that because PIP benefits are mandated by the no-fault act, that statute is the "rule book" for deciding any questions involving those benefits. *Id*. at 524-525. However, the Court explained that

> the insurance policy itself, which is the contract between the insurer and the insured, controls the interpretation of its own provisions providing benefits not required by statute. Therefore, because uninsured motorist benefits are not required by statute, interpretation of the policy dictates under what circumstances those benefits will be awarded. [*Id*. at 525 (footnote omitted).]

The Court clarified that when dealing with uninsured motorist benefits, the policy definitions control. *Id*. at 534.

In *Twichel*, the Court followed *Rohlman* and considered a claim for uninsured motorist benefits based only on the policy, without reference to the no-fault act, because uninsured motorist coverage is not required under the no-fault act. The issue in *Twichel* involved whether an automobile was "owned" by the insured. The Court held that the meaning of the term "owned" was to be determined from the policy language and the commonly understood meaning of the term. *Id*. at 533-535. The Court further held that

> [t]he Court of Appeals erred in importing the statutory definition of "owner" into the policy language. There is nothing in the plain language of the policy

> supporting the application of the definition of "owner" in MCL 500.3101(2)(g) to this independent, nonstatutory coverage. [*Twichel, supra* at 534.]

We disagree with plaintiff's argument that *Hill* is no longer good law in light of *Rohlman* and *Twichel*. The decisions in *Rohlman* and *Twichel* establish that uninsured motorists coverage is a matter of contract, because such coverage is not mandated by the no-fault act. Thus, in *Twichel*, it was improper to rely on the statutory definition of "owner" when there was nothing in the plain language of the policy to support application of that statutory definition. In this case, however, defendant's policy expressly limits its liability for uninsured motorist benefits to damages that an insured "is legally entitled to recover from the owner or operator of an uninsured automobile." The significance of this language is that it defines the scope of defendant's contractual liability for uninsured motorist benefits. In this respect, *Hill* is directly on point. Under *Hill*, the policy language "legally entitled to recover" effectively incorporates the threshold requirements of MCL 500.3135(1). Neither *Rohlman* nor *Twichel* undermine the holding of *Hill* in this respect.

This conclusion is supported by our Supreme Court's more recent decision in *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005), in which the Court explained:

> Uninsured motorist insurance permits an injured motorist to obtain coverage from his or her own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver. Uninsured motorist coverage is optional—it is not compulsory coverage mandated by the no-fault act. Accordingly, the rights and limitations of such coverage are purely contractual and are construed without reference to the no-fault act. [Footnotes omitted.]

In a footnote, the Court added:

> The owner or operator of a vehicle is subject to tort liability for noneconomic loss only if the injured motorist has suffered death, serious impairment of a body function, or permanent serious disfigurement. MCL 500.3135(1); *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004); *Auto Club Ins Ass'n v Hill*, 431 Mich 449; 430 NW2d 636 (1988). [*Rory, supra* at 465 n 10.]

Although *Rory* involved the enforceability of a one-year limitations period contained in the parties' policy, which was significantly less than the period of limitations set by statute, the Court's citation to *Hill*, in a case in which the Court emphasized that uninsured motorist benefits are a matter of contract, reflects the Court's continued adherence to the notion that the no-fault threshold in MCL 500.3135(1) may continue to govern claims for uninsured motorist benefits, particularly in a case as this where the policy expressly limits the insurer's liability for uninsured

motorist benefits to damages that an insured "is legally entitled to recover from the owner or operator of an uninsured automobile."

For these reasons, we conclude that *Hill* is controlling.[1] Because plaintiffs do not dispute that they could not prove a threshold injury, the trial court did not err in granting defendant's motion for summary disposition. Likewise, because Raymond Thompson cannot satisfy the no-fault threshold, Jean Thompson's loss of consortium claim also was properly dismissed.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

[1] Plaintiffs rely on *Detroit Automobile Inter-Ins Exch v Hafendorfer*, 38 Mich App 709, 717-718; 197 NW2d 155 (1972), for a definition of the term "legally entitled to recover" that is not based on the no-fault act. However, *Hafendorfer* was decided before *Hill*. Therefore, to the extent that *Hafendorfer* is inconsistent with *Hill*, the later decision controls.